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3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF WASHINGTON
5

6 LAURIE R. BERQUIST,

7 No. 14-CV-00295-SMJ

8 Plaintiff,

9 v.

10 **ORDER DENYING DEFENDANT'S
11 MOTION FOR SUMMARY
12 JUDGMENT**

13 LORETTA E. LYNCH,

14 Defendant.

15 Before the Court is Defendant Loretta E. Lynch's Motion for Summary
16 Judgment, ECF No. 56. In this case, Plaintiff alleges reasonable accommodation
17 and retaliatory termination claims under the Rehabilitation Act, 29 U.S.C. § 791 *et
18 seq.*, and the Americans with Disabilities Act, 42 U.S.C. § 12111 *et seq* against
19 her former employer the United States Trustee Program (USTP). Defendant
20 moves for summary judgment on all of Plaintiff's claims, arguing that: (1)
Plaintiff's reasonable accommodation claim fails because Plaintiff was not
qualified for her position and because she acted in bad faith during the
accommodation process; (2) Plaintiff's retaliation claim fails because Defendant
has stated legitimate reasons for terminating Plaintiff; and (3) Plaintiff's claims
are barred by the doctrine of judicial estoppel. Because disputed issues of material

1 fact remain with respect to Plaintiff's reasonable accommodation and retaliation
2 claims, and Plaintiff's claims are not barred by judicial estoppel, the Court denies
3 Defendant's motion

I. BACKGROUND

A. Factual Background

6 Laurie Berquist began working as a law clerk for the office of the U.S.
7 Trustee in Spokane in 1997. In early 2010, Plaintiff began to exhibit symptoms of
8 a then-undiagnosed health condition, which impacted major life activities and her
9 ability to regularly attend her normal work schedule. Between 2010 and 2011,
10 Berquist took an average of 7 weeks of leave per year allegedly because she had a
11 variety of medical conditions that made her unable to work.

In March 2012, Plaintiff was diagnosed with a thyroid disorder. She also began to experience additional symptoms possibly related to this disorder such as syncopal episodes, clinical depression, and sleep disorder. These conditions continued to substantially limit many of Plaintiff's major life activities. Defendant issued a "Leave Restriction Memorandum" in July of 2012. The memorandum outlined the existing procedures for approval of paid medical and annual leave, and stated that Plaintiff would be held to these procedures, and provided that Plaintiff was no longer eligible for a compressed or flexible work schedule. The

1 memorandum further required Plaintiff to substantiate any unscheduled medical
2 leave with doctors' certificates.

3 In September 2012, Plaintiff was granted medical leave through December
4 2012 under the Family Medical Leave Act (FMLA). On November 30, 2012,
5 Plaintiff requested an extension of this leave of absence. Defendant asked for an
6 expected return to work date and documents detailing the nature and severity of
7 Plaintiff's condition, the length of time it may last, and any anticipated treatments.

8 Plaintiff's psychologist sent a letter to Defendant on December 12, 2012
9 stating that Plaintiff "is suffering from a number of medical conditions," and, in
10 her opinion, Plaintiff "is not able to return to full working capacity at this time."
11 On January 1, 2013, Plaintiff informed Defendant that she expected to return to
12 work on February 4, 2013. In a letter dated January 28, 2013, Plaintiff's internal
13 medicine specialist provided information regarding Plaintiff's specific medical
14 conditions and a return to work estimate of July 2013. On February 1, 2013,
15 Plaintiff informed Defendant that she would not be returning to work on February
16 4, 2013, and that she would like to request unpaid leave through July 2013. On the
17 same day Defendant informed Plaintiff that her previous request for an extension
18 of leave without pay was denied, and that she had been considered absent without
19 leave as of December 20, 2012.

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1 On June 5, 2013, Defendant formally proposed Plaintiff's termination from
2 employment. As primary reasons for dismissal, Defendant cited to Plaintiff's
3 approximate 888 total hours of absence and the serious loss of confidence in
4 Plaintiff's ability to report to work on July 1, 2013 or thereafter.

5 On July 1, 2013, Plaintiff returned to work full-time. After returning to
6 work full-time, Plaintiff again did not comply with the requirements set out in the
7 July 2010 Leave Restriction Memorandum.

8 On September 24, 2013, the June 5 removal proposal was adopted and
9 Plaintiff's employment was terminated.

10 **B. Procedural History**

11 Plaintiff filed her complaint on September 9, 2014, and Defendant answered
12 on November 21, 2014. ECF Nos. 1, 4. Plaintiff moved for summary judgment on
13 May 5, 2015. ECF No. 13. This Court denied Plaintiff's motion in an order dated
14 August 14, 2015. ECF No. 41. Defendant filed this motion for summary judgment
15 on November 23, 2015, ECF No. 56, Plaintiff responded on December 14, 2015,
16 ECF No. 74, and Defendant filed a reply on January 19, 2016, ECF No. 96.

1 II. SUMMARY JUDGMENT STANDARD

2 Summary judgment is appropriate if the “movant shows that there is no
3 genuine dispute as to any material fact and the movant is entitled to judgment as a
4 matter of law.” Fed. R. Civ. P. 56(a). Once a party has moved for summary
5 judgment, the opposing party must point to specific facts establishing that there is
6 a genuine dispute for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If
7 the nonmoving party fails to make such a showing for any of the elements
8 essential to its case for which it bears the burden of proof, the trial court should
9 grant the summary judgment motion. *Id.* at 322. When considering a motion for
10 summary judgment, the Court does not weigh the evidence or assess credibility;
11 instead, “the evidence of the non-movant is to be believed, and all justifiable
12 inferences are to be drawn in his favor.” *Anderson v. Liberty Lobby, Inc.*, 477
13 U.S. 242, 255 (1986).

14 III. DISCUSSION

15 A. Reasonable Accommodation

16 In order to make a prima facie reasonable accommodation claim, a plaintiff
17 must show that (1) she suffers from a disability within the meaning of the Act, (2)
18 she is a qualified individual inasmuch as she is able to perform the essential
19 functions of her job with or without reasonable accommodation, and (3) she
20 suffered an adverse employment action solely because of her disability. *Walton v.*

1 *United States Marshals Serv.*, 492 F.3d 998, 1005 (9th Cir. 2007). Defendant
2 argues that Berquest's reasonable accommodation claim must fail because she was
3 not qualified for her position and because she acted in bad faith during the
4 accommodation process.

5 **1. Defendant has not established that Plaintiff was unqualified.**

6 To be a qualified individual under the Rehabilitation Act the disabled
7 individual must have "requisite skill, experience, education and other job related
8 requirements." 29 C.F.R. §1630.2(m); *Bates v. United Parcel Serv., Inc.*, 511 F.3d
9 974, 990 (9th Cir. 2007). Additionally, the disabled individual must be able to
10 perform the "essential functions" of the position, with or without reasonable
11 accommodation. 42 U.S.C. §12111(8); *see Humphrey v. Mem'l Hosps. Ass'n*, 239
12 F.3d 1128, 1135 (9th Cir. 2001).

13 Defendant does not argue that Plaintiff lacked the skill, experience, or
14 education required for her job. In fact, it appears to be undisputed that Plaintiff
15 held the requisite skills, experience, and education to perform the job. ECF No. 41
16 at 11. Instead, Defendant argues that Plaintiff was not qualified because regular
17 attendance is itself an essential job function that Plaintiff was not able to perform.
18 ECF No. 56 at 14.

19 The court already considered this issue in connection with Plaintiff's
20 motion for summary judgment, holding that regular and predictable attendance is

1 not per se an essential function of all jobs, and finding that neither party had
2 established that summary judgment was appropriate on the question whether
3 Berquist was qualified for her position. ECF No. 41 at 12–13. For the reasons
4 discussed below, the Court’s conclusion remains the same.

5 Defendant cites *Sampler v. Providence St. Vincent Medical Center*, to
6 support its argument here, quoting that court’s statement that “[i]t is a rather
7 common sense idea that if one is not able to be at work, one cannot be a qualified
8 individual.” 675 F.3d 1233, 1237 (9th Cir. 2012). But *Sampler* does not stand for
9 the proposition that regular attendance is per se an essential function of all jobs.
10 Instead, *Sampler* holds that irregular attendance may compromise essential
11 functions in many jobs, but that regular attendance is not required for all jobs. *Id.*
12 at 1237–39. After citing a number of cases holding that specific jobs required
13 regular attendance, the court proceeded to evaluate whether regular attendance
14 was required for the plaintiff’s job as a neo-natal nurse, concluding that it was. *Id.*
15 at 1239.

16 Defendant has not pointed to facts sufficient to show that regular attendance
17 is an essential job function for a legal assistant at the U.S. Trustee Program or that
18 Plaintiff is incapable of meeting the attendance requirement for the job. Even if
19 Defendant had presented such evidence, plaintiff has produced evidence tending
20 to show that regular attendance may not be required: specifically, that the U.S.

1 Trustee Program had provided extended leave to many other employees, including
2 legal assistants, and that she and other employees were allowed to work flexible
3 schedules and to telework. ECF No. 74 at 4–5. Accordingly, at a minimum,
4 material issues of disputed fact remain concerning whether Plaintiff was qualified
5 for her position.

6 **2. Defendant has not established that Plaintiff acted in bad faith.**

7 The ADA requires a process of “communication and good-faith exploration
8 of possible accommodations between employers and individual employees”
9 commonly called the interactive process. *Humphrey*, 239 F.3d at 1137 (citing
10 *Barnett*, 228 F.3d 1105 at 1114-15). Typically, a breakdown in the process is the
11 result of a party to the process not engaging in good faith. *See Smith v. Midland*
12 *Brake, Inc.*, 180 F.3d 1154, 1172 (citing *Beck v. University of Wisconsin Bd. of*
13 *Regents*, 75 F. 3d 1130, 1135 (7th Cir. 1996) (instructing courts to isolate the
14 cause of a breakdown and assign responsibility by identifying the bad faith
15 engagement of one of the parties)).

16 Defendant argues that Plaintiff obstructed this process by acting in bad
17 faith, justifying Defendant’s refusal to continue to accommodate her. ECF No. 56
18 at 15. Specifically, Defendant argues that Plaintiff (1) admitted she lied about
19 visiting her mother in the hospital and then testified she was “sure” she lied at
20 other times to USTP because “everyone lies”; (2) refused to provide details about

1 the medical conditions and documentation to support leave requests; (3) made
2 conflicting statements to USTP concerning when she could return to work; (4)
3 provided multiple, different return to work days; (5) violated leave restriction
4 protocol on multiple occasions; and (6) took a trip to Florida for two weeks at the
5 same time she claimed she couldn't get out of bed because of syncope episodes.
6 ECF No. 56 at 15–17. Plaintiff disputes these allegations, pointing to evidence
7 that she did provide information concerning her medical conditions and
8 documentation to support her leave requests and arguing that she was honest and
9 forthcoming throughout the process. ECF No. 74 at 6–7. Plaintiff further argues
10 that it was Defendant that acted in bad faith. ECF No. 74 at 9.

11 As was the case when the court decided Plaintiff's motion from summary
12 judgment, it is clear that there was a breakdown somewhere in this interactive
13 process, but it remains unclear whether the breakdown was caused by the bad-
14 faith or obstructive behavior of Plaintiff or Defendant. Reasonable minds could
15 differ on whether either party made sufficient efforts in good faith to explore
16 possible accommodation.

17 **3. Defendant is not entitled to summary judgment on the basis that
18 Plaintiff was reasonably accommodated for three years.**

19 Defendant argues that “[t]he USTP’s decision to provide every
20 accommodation Plaintiff requested for nearly three years amply demonstrates that
the agency acted reasonably and in good faith,” and that “[a]n employer is not

1 required to continue to offer accommodations after a lengthy period of
2 unsuccessful accommodations.” ECF No. 56 at 17. While failure of past
3 accommodation may be relevant to an employer’s determination of what, if any,
4 alternate accommodation may be available, it does not relieve the employer of its
5 continuing obligation to engage in the interactive process. *See Humphrey*, 239
6 F.3d at 1138 (“[T]he employer’s obligation to engage in the interactive process
7 extends beyond the first attempt at accommodation and continues when the
8 employee asks for a different accommodation or where the employer is aware that
9 the initial accommodation is failing and further accommodation is needed.”).
10 Accordingly, if USTP reasonably accommodated Plaintiff’s health issues for three
11 years, it would not be dispositive of whether USTP continued to make the
12 required efforts to engage in the interactive process and reasonably accommodate
13 Plaintiff.

14 **B. Defendant Is Not Entitled to Summary Judgment on Plaintiff’s
15 Retaliation Claim.**

16 To make a prima facie case of retaliation under the Rehabilitation Act, a
17 plaintiff must show “(1) involvement in a protected activity, (2) an adverse
18 employment action and (3) a causal link between the two.” *Brown v. City of
19 Tucson*, 336 F.3d 1181, 1187 (9th Cir. 2003). “Once the plaintiff establishes a
20 prima facie case, the employer has the burden to ‘present legitimate reasons for
the adverse employment action.’” *Coons v. Sec’y of U.S. Dep’t of Treasury*, 383

1 F.3d 879, 887 (2004) (quoting *Brooks v. City of San Mateo*, 229 F.3d 917, 928
2 (9th Cir. 2000)). If the employer meets its burden, the burden shifts again to the
3 Plaintiff to show that the employer's stated reasons for the adverse action were
4 pretext. *See id.*

5 Defendant cites a number of allegedly permissible reasons for firing
6 plaintiff, including excessive unscheduled absences, failure to communicate, and
7 making inconsistent statements about her need to be absent based on her medical
8 conditions. ECF NO. 56 at 11–12. Defendant argues that these reasons are
9 sufficient to show that its decision to terminate Plaintiff was permissible and that
10 there is no evidence that Plaintiff's termination was pretext for discrimination.
11 ECF No. 56 at 20. Plaintiff, however, disputes the legitimacy of each of
12 Defendant's stated basis for her termination. ECF No. 74 at 15–18.

13 The Court concludes that disputed material issues of fact remain concerning
14 the actual basis for Plaintiff's termination, and summary judgment is not
15 appropriate on this claim.

16 **C. Judicial Estoppel Does Not Bar Plaintiff's Claims**

17 “Judicial estoppel is an equitable doctrine that precludes a party from
18 gaining an advantage by asserting one position, and then later seeking an
19 advantage by taking a clearly inconsistent position.” *United States v. Kim*, 806
20 F.3d 1161, 1167 (9th Cir. 2015) (quoting *Hamilton v. State Farm Fire & Cas. Co.*,

1 270 F.3d 778, 782 (9th Cir. 2001)). To determine whether judicial estoppel applies,
2 the Court considers whether: (1) a party's later position is "clearly inconsistent
3 with its earlier position"; (2) the party succeeded in its prior position; and (3) "the
4 party seeking to assert an inconsistent position would derive an unfair advantage
5 or impose an unfair detriment on the opposing party if not estopped." *New*
6 *Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001) (citations omitted).

7 Defendant argues that judicial estoppel bars Plaintiff's claims because she
8 allegedly made prior statements or claims to Defendant and the Social Security
9 Administration that are "clearly inconsistent" with her claims in this case. ECF
10 No. 56 at 19. Defendant relies on the inconsistencies between Plaintiff's October
11 2013 statement to Washington's Employment Security Department that "there
12 was no reason for [the USTP] to fire me since my health issues were under
13 control" and her statements to the Social Security Administration and in this
14 action that she was unable to work as of September 27, 2013. ECF No. 56 at 19.

15 Plaintiff argues that her statement to the Employment Security Department,
16 viewed in context is not inconsistent with her later statements and is, at worst, the
17 result of inadvertence or mistake. ECF No. 74 at 12–13. She further explains that,
18 even if she believed she could work in October 2013, with the benefit of hindsight
19 and a better understanding of her mental health, she had a sound basis for
20 changing that opinion. ECF No. 74 at 14.

1 While the apparent inconsistencies in Plaintiff's statements are concerning,
2 the Court cannot conclude that Plaintiff's current position is so clearly
3 inconsistent with a prior position that it "amount[s] to an affront on the court."
4 *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 235 F.3d 1184, 1190 (9th Cir.
5 2000); *see also New Hampshire*, 532 U.S. at 750–51. Additionally, Defendant has
6 not demonstrated how Plaintiff would obtain an unfair advantage or impose an
7 unfair detriment on Defendant if her claims are not estopped. Contrary to
8 Defendant's argument, Plaintiff's inconsistent statements do not prevent
9 Defendant from "meaningfully evaluat[ing] Plaintiff's liability and damage
10 claims." ECF No. 56 at 19. Defendant is certainly capable of considering and
11 taking a litigation position on Plaintiff's statements about when she could work
12 and the importance of the statements with respect to issues of liability and
13 damages.

14 Accordingly, Plaintiff's claims are not barred by judicial estoppel.

15 **IV. CONCLUSION**

16 Viewing the facts in the light most favorable to Plaintiff, the Court finds
17 that genuine disputes of material facts preclude summary judgment in favor of the
18 Defendant. The Court also concludes that Plaintiff's claims are not barred by the
19 doctrine of judicial estoppel.

20 Accordingly, **IT IS HEREBY ORDERED:**

1 Defendant's Motion for Summary Judgment, ECF No. 56, is

2 **DENIED.**

3 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order
4 and provide copies to all counsel.

5 **DATED** this 19th day of August 2016.

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8 SALVADOR MENDOZA, Jr.
9 United States District Judge
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